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Labor Standards and the Generalized System of Preferences: The European Labor Incentives

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STUDENT NOTE

LABOR STANDARDS AND THE GENERALIZED SYSTEM OF PREFERENCES: THE EUROPEAN LABOR INCENTIVES

Anthony N. Cole*

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INTRODUCTION

The question of how, if at all, trade relations should be conditioned upon or even tied to the international imposition of labor standards has been a major source of conflict within the trading community for many years, but has risen to particular prominence during the last decade.¹ Arguments raised in these disputes have varied from substantive discussions about the economic desirability of such linkage² to more

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1. See, e.g., Christopher M. Bruner, *Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas (FTAA)*, 33 U. MIAMI INTER-AM. L. REV. 1, 18 (2002) (discussing the connection between President Clinton's linkage of trade and labor, and Clinton's loss of "fast-track" authorization); Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U PA. J. INT'L ECON. L. 61 (2001); John Burgess & Rene Sanchez, *Clinton's Remarks on Sanctions Open Rift*, WASH. POST, Dec. 3, 1999, at A30; Nancy Cleeland, *Labor Leaders Want Worker Safeguards Built Into Trade Accords*, L.A. TIMES, Dec. 3, 1999, at A19; Steven Greenhouse & Joseph Kahn, *U.S. Effort to Add Labor Standards to Agenda Fails*, N.Y. TIMES, Dec. 3, 1999, at A1; Steve Pearlstein, *Trade Theory Collides with Angry Reality*, WASH. POST, Dec. 3, 1999, at A1; Pradeep S. Mehta et. al., *Third World Intellectuals and NGO's Statement Against Linkage*, at <http://www.cuts-india.org/Twin-sal.htm> (last modified Nov. 15, 1999).

2. See, e.g., MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 441–63 (2d ed. 1999); Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885 (2003); Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126 (2002); International Monetary Fund, *Debt Relief, Globalization, and IMF Reform: Some Questions and Answers* (Apr. 12, 2000), at <http://www.imf.org/external/np/exr/ib/>

impassioned disputes involving accusations of “protectionism” and “exploitation.”³

While it remains unclear whether any genuinely enforceable global labor standards will be set in the near future,⁴ one approach adopted by the European Communities (“EC”), in which tariff discounts are granted to those developing countries whose labor regulations conform to certain standards, has generated much optimism. These discounts are offered as part of the European Communities’ Generalized Scheme of Preferences (“GSP”), one of many such programs set up by developed countries in the early 1970’s to assist industries in developing countries, through preferential access to the developed country’s market. However, on December 9, 2002, India requested that a World Trade Organization (“WTO”) dispute resolution panel be formed to evaluate the EC’s GSP, claiming that the scheme is inconsistent with the EC’s obligations under the WTO charter.⁵

This Note offers an introduction to the history of the GSP system, and critiques India’s claim that the particular GSP scheme enacted by the EC is unacceptable under WTO law. It ultimately concludes that while the EC’s GSP scheme does indeed raise issues not raised by the GSP scheme of any other country, it is nonetheless not inconsistent with the EC’s WTO obligations. Part 2 discusses the development of the international GSP regime, as incorporated into the legal structure of the WTO, and thereby establishes what originally was and was not seen as permis-

2000/041200b.htm (noting the IMF’s statement that it “fully supports” the promotion of the International Labor Organization’s “Core Labor Standards”).

3. See, e.g., T.N. SRINIVASAN, DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM 71–80 (1998); World Trade Organization, *Top 10 Reasons to Oppose the World Trade Organization?: Criticism, Yes . . . Misinformation, No!*, at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/03lab_e.htm (last visited Sept. 15, 2003) (noting that some developing countries see calls for inclusion of labor standards in the WTO rules as a “guise for protectionism in developed-country markets”).

4. Distinguishing here the International Labor Organization “standards”, which are binding only upon those countries that have signed the relevant convention, and are backed by no enforcement power. See Jill Borak, *A Wink and a Nod: The Hoffman Case and its Effect on Freedom of Association for Undocumented Workers*, 10 HUM. RTS. 20, 23 (2003) (“the ILO has no enforcement powers. In past complaints before the ILO the United States took no action to implement the organization’s recommendations”); see also Hans W. Baade, *The Operation of Foreign Public Law*, 30 TEX. INT’L L.J. 429, 446 (1995) (ILO standards “fail to lay down specific, directly enforceable legal obligations, but rather limit themselves to setting forth standards of conduct deemed desirable by the respective international organizations and their member states”).

5. European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, Request for the Establishment of a Panel by India, WTO Doc. WT/DS246/4 (Dec. 9, 2002). A panel was formed on March 6, 2003. WTO Secretariat, *Note on European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, Constitution of the Panel Established at the Request of India*, WTO Doc. WT/DS246/5 (Mar. 6, 2003).

sible within such schemes. Part 3 then details the specifics of the EC's GSP, particularly those parts that have given rise to the current dispute with India. Finally, Part 4 analyzes the legal arguments at the center of the dispute over the EC's GSP scheme, and explains why such a scheme should ultimately be held to be WTO-consistent.

I. HISTORY AND DEVELOPMENT OF THE GSP

Although the current international trading system for a long time has operated largely free from constraint by social concerns, various countries have at one time or another pushed the idea that trade should be viewed as merely one consideration among others, rather than an end in itself.⁶ Indeed, the birth of the current system was originally only a temporary measure introduced after the failure of the Havana Charter, a comprehensive trade/social agreement that was negotiated after World War II.⁷ The United States' refusal to ratify the Charter made it worthless as the basis for an international system, as it could not operate effectively without the participation of one of the largest economies in the world.⁸ Nonetheless, the countries involved agreed that rather than lose all the benefits of the agreement, the trade component of the Charter should remain in place until another comprehensive trade/social agreement could be negotiated.⁹ Thus was born the General Agreement on Tariffs and Trade ("GATT"), the foundation of the WTO.¹⁰ Of course, the desired comprehensive trade/social agreement was never achieved, and

6. Including the United States, which attempted to attach labor conditionality to its trade agreements under the Eisenhower administration. Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1432-37 (2001). For more theoretical discussions of this question see Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975 (2000); Ethan B. Kapstein, *Distributive Justice and International Trade*, 13 ETHICS & INT'L AFF. 175 (1999).

7. HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, U.N. Doc. E/Conf.2/78 (1948). See Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123 (1995); Anne O. Krueger, *Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?*, 13 J. ECON. PERSP. 105, 105-06 (1999).

8. See Demaret, *supra* note 7, at 127 ("Due to the United States' failure to ratify the Havana Charter, the Charter never entered into force, and the General Agreement, by force of circumstances, remained in force.").

9. Scott Daniel McBride, *Reformulating Executive and Legislative Relationships after Reformulated Gasoline: What's Best for Trade and the Environment?*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 299, 303 (1998).

10. General Agreement on Tariffs & Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

the GATT simply continued as an independent agreement, severed from all concerns other than promoting trade.¹¹

The cornerstone of GATT is the principle of non-discrimination (“MFN”),¹² according to which no country can give the products of one Member country better treatment than it gives to those of any other Member. This means, for example, that England cannot attempt to benefit a former colony by giving its products special tariff discounts. However, it also means that developed countries cannot give special discounts to developing countries to help them cultivate domestic industries. Consistent with the historical excision of social concerns from the GATT, the MFN principle rejects all “discrimination” outright, disregarding any justification offered for differential treatment.¹³

Despite the fundamental place of the MFN principle within the GATT, discrimination has never been completely excluded from the system. Even at the time of the initial adoption of the agreement, countries with preferential trading agreements already in place were allowed to continue them, though special exemptions from the MFN principle had to be arranged.¹⁴ Moreover, Article XXIV of GATT permits “preferential trading arrangements”, or free trade zones, between countries.¹⁵ Nonetheless, apart from such special exceptions necessary to gain the accession of major developed countries, non-discrimination was agreed upon as the basis for the trading system.

This was a particular source of contention for those developing countries participating in the original negotiations for GATT. They argued strongly that unequal countries should not be treated equally, and

11. *Id.* It should be noted that there is some consideration given to non-economic concerns in Article XX of GATT. GATT, *supra* note 10, art. XX. Indeed, at least one author has specifically argued that Article XX of GATT can itself act as a legal foundation for imposing labor rights conditionality upon imports. ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (2000), available at <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html> (last visited Aug. 12, 2003).

12. The abbreviation stands for Most Favored Nation, the name given to the non-discrimination principle. It is in Article I of GATT, reflecting its importance to the subsequent agreement. GATT, *supra* note 10, art. I. Most Favored Nation clauses had actually become popular even before GATT, as a way of avoiding difficulties created by the need to negotiate numerous bilateral tariff agreements. Krueger, *supra* note 7, at 105. See also Lothar Ehring, *De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment—Or Equal Treatment?*, Jean Monnet Working Paper No. 12/01 (2001), available at <http://www.jeanmonnetprogram.org/papers/01/013201.html> (last visited Aug. 13, 2003).

13. Teresa Edwards, *The Relocation of Production and Effects on the Global Community*, 13 COLO. J. INT’L ENVTL. L. & POL’Y 183, 201 (2002).

14. ROLF J. LANGHAMMER & ANDRE SAPIR, ECONOMIC IMPACT OF GENERALIZED TARIFF PREFERENCES 2 (1987). This has special relevance to the current case, as these were agreements often designed to help developing former colonies. *Id.*

15. GATT, *supra* note 10, art. XXIV.

that developing countries should be given special preferences within the agreement to compensate for their inferior economic capacity.¹⁶ However, developed countries, particularly the United States, insisted that developing countries would actually benefit most by taking part in a system of free trade, and that special benefits would merely retard their development.¹⁷ Moreover, the developed countries saw the problems of developing countries as similar to those faced by European countries after the war, and believed that if free trade would help the European countries recover, then it should do the same for developing countries.¹⁸

Although failing in their general demand for preferential treatment under GATT, the developing countries did succeed in some respects, such as the acceptance of Article XVIII of GATT, which allows developing countries to deviate temporarily from GATT standards.¹⁹ Still, they had been seriously hurt by the failure of the Havana Charter, which had included far more extensive benefits for them, and they viewed the non-discrimination approach of the GATT as itself discrimination by developed countries against developing countries. Consequently, they played little part in the subsequent unfolding of the trading system for over a decade.²⁰

As a result, it is perhaps not surprising that the GATT was initially administered in a way overwhelmingly beneficial to the developed countries, confirming the belief of the developing countries that the GATT was really just an institution designed to fulfill the needs of developed nations, often to the detriment of the developing ones.²¹ Various attempts to set up an organization with the more general responsibilities of the Havana Charter ultimately all failed.²²

By the late 1950's, however, the developing countries began to get more involved in the international trading system, due to a combination of their own increased political stability and a change in attitude about

16. LANGHAMMER & SAPIR, *supra* note 14, at 6-7.

17. See DELSIE M. GANDIA, THE EEC'S GENERALISED SCHEME OF PREFERENCES AND THE YAOUNDE AND OTHER AGREEMENTS: BENEFITS IN TRADE AND DEVELOPMENT FOR LESS DEVELOPED COUNTRIES 33 (1981).

18. See *id.*

19. GATT Article XVIII(4)(a) states:

Consequently, a contracting party, the economy of which can only support low standards of living and is in the early stages of development, shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.

GATT, *supra* note 10, art. XVIII(4)(a).

20. LANGHAMMER & SAPIR, *supra* note 14, at 3.

21. GANDIA, *supra* note 17, at 34.

22. These attempts came at the instigation of the USSR and developing countries themselves. *Id.*

the benefits of free trade.²³ They had generally converted to the free trade agenda consistently pushed by the developed countries, but still objected that the trading system as it actually existed was primarily designed to benefit developed countries, and was not truly aimed at achieving genuine equality.²⁴ Since they were now a part of the trading system, though, and no longer simply objecting from outside, their complaints began to receive more serious attention, until finally, in 1958, GATT formed an expert committee of economists to investigate their claims.²⁵

The Haberler Report²⁶ concluded that developing countries were indeed lagging in trade growth, and that at least part of the cause of this lag was discriminatory policies within developed countries.²⁷ In response to this report, the GATT contracting parties established another committee to investigate whether the developed countries were indeed responsible for the retarded growth of the developing countries.²⁸ When this committee also answered in the affirmative, the GATT contracting parties finally agreed to deal with the problem, even in cases in which the policies in question were not strictly GATT-inconsistent.²⁹ The developing countries thus had their first major success in forcing the international trading system to take account of their views, although the concessions given by the developed countries still only extended to

23. See Robert E. Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 67, 70–71 (1992).

24. LANGHAMMER & SAPIR, *supra* note 14, at 5.

25. The panel consisted of Haberler (chair), Meade, Tinbergen and Campos. Third World Network, *History and Evolution of the Trading System*, at <http://www.twinside.org.sg/title/undp2.htm> (last visited Dec. 27, 2002).

26. GENERAL AGREEMENT ON TARIFFS AND TRADE, TRENDS IN INTERNATIONAL TRADE: REPORT BY A PANEL OF EXPERTS (1958). For a discussion of this report, see Craig N. Murphy, *What the Third World Wants: An Interpretation of the Development and Meaning of the New International Economic Order Ideology*, in *THE POLITICS OF GLOBAL GOVERNANCE* 261, 266 (Paul F. Diehl ed., 2d ed. 2001).

27. LANGHAMMER & SAPIR, *supra* note 14, at 4.

28. *History and Evolution of the Trading System*, *supra* note 25.

29. The established committee found

[T]hat high tariffs faced the exports of developing countries over a wide range of products—vegetable oils, coffee, tea, cocoa, jute products, cotton products, leather goods and a variety of sophisticated manufactured products. The report also revealed that in addition, these exports faced domestic taxes and levies that in fact restrained consumption. Since there were no ‘equivalent’ domestic products, the internal taxes were not seen as a violation of GATT, and yet they came in the way of demand and hence imports.

removing trade barriers, and did not encompass the positive trade assistance that developing countries had long sought.³⁰

The developing countries took their next major step in 1962, when what would eventually become the "Group of 77"³¹ held its first conference, on the Problems of Developing Countries.³² The Declaration issued after this conference was presented at the next UN General Assembly, and called for the holding of an international economic conference on trade and development in the near future. When the same idea was again presented at the 1962 Session of the Economic and Social Council (ECOSOC),³³ it was agreed that ECOSOC would indeed convene a Conference on Trade and Development (UNCTAD).³⁴ The first UNCTAD conference was subsequently scheduled for March 23 to June 16, 1964.³⁵

Not content merely to wait for the UNCTAD conference, however, developing countries continued to push their agenda at the 1963 GATT ministerial meeting.³⁶ As a result of this pressure, the Contracting Parties endorsed, with reservations, an action program under which developed countries would remove those trade barriers that handicapped developing countries.³⁷ They also proposed that GATT itself should be altered to

30. Note, *Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development*, 108 HARV. L. REV. 1715, 1719 (1995); ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* 44-45 (1987).

31. The Group of 77 describes itself in the following way: "As the largest Third World coalition in the United Nations, the Group of 77 provides the means for the developing world to articulate and promote its collective economic interests and enhance its joint negotiating capacity on all major international economic issues in the United Nations system, and promote economic and technical cooperation among developing countries." Group of Seventy-Seven at the United Nations, at <http://www.g77.org/main/main.htm> (last visited Mar. 16, 2003). Although the Group of 77 continues to exist and remains active, one commentator has noted that "over the years, the differences between developing countries (large/small, middle income/least developed, industrialised/commodity exports, agricultural importers/exporters, and others) have grown, to the point that in the Uruguay round a grand coalition of all developing countries does not exist in any active sense." John Whalley, *Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries*, 100 ECON. J. 1318, 1318 (1990).

32. Thirty-six developing countries attended. GANDIA, *supra* note 17, at 35.

33. "ECOSOC is responsible for promoting higher standards of living, full employment, and economic and social progress; identifying solutions to international economic, social and health problems; facilitating international cultural and educational cooperation; and encouraging universal respect for human rights and fundamental freedoms." United Nations Economic and Social Council Website, at <http://www.un.org/esa/coordination/ecosoc/about.htm> (last visited Mar. 16, 2003).

34. The major trading nations initially opposed UNCTAD when it was first proposed in 1962, but even then suggested that they could change their minds. GANDIA, *supra* note 17, at 35.

35. *Id.*

36. D.M. McRae & J.C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 AM. J. INT'L L. 51, 53 (1983).

37. The U.S. and Europe were divided over this idea, as the U.S. was insistent on non-discrimination, while Europe had no objection, since the European countries already had a

facilitate the trade of developing countries.³⁸ Finally, Belgium and the United Kingdom both proposed early attempts at a system of tariff preferences for all developing countries.³⁹

None of these proposals ultimately succeeded. The Belgian and United Kingdom plans were simply rejected, and the proposed action program, though endorsed, was never officially adopted.⁴⁰ The one apparent success was the most ambitious proposal: changing the very structure of GATT itself. Incorporated into GATT two years later, Part IV encourages developed countries to give special consideration to developing countries, and suggests that developed countries should not ask for reciprocity from developed countries in the granting of preferences.⁴¹ However, because Part IV was only aspirational, and hence not binding in its commitments, it ultimately had little real effect.⁴²

Many developed countries were convinced that the combination of adding Part IV to the GATT and the tariff reductions expected in the upcoming Kennedy Round of negotiations would satisfy developing countries.⁴³ Yet, developing countries continued their efforts to change the international trading system, particularly the MFN principle.⁴⁴

Finally, in 1964, the first UNCTAD conference took place, with 120 countries taking part.⁴⁵ Each country had one vote, and there were no

system of trade preferences with their former African colonies. The U.S., however, objected to the EC's preference schemes because of their reciprocal nature, which meant that African countries had to give reciprocal tariff preferences to European products, giving them an advantage over American ones. LANGHAMMER & SAPIR, *supra* note 14, at 5-6.

38. GANDIA, *supra* note 17, at 36.

39. The Brasseur plan called for enormous bilateral negotiations in which developed and developing countries would negotiate tariff preferences product by product. The preferences would then be tailored to the level of development of each country, each country's capacity in the product in question, etc. It also did not exclude requiring reciprocal preferences from recipient developing countries. The U.K. also proposed to extend the preferences it already gave to Commonwealth countries to all less developed countries if other countries did the same. It has been suggested that these plans were proposed purely for political capital, with full awareness that they would never be approved by the United States. GANDIA, *supra* note 17, at 36.

40. LANGHAMMER & SAPIR, *supra* note 14, at 6.

41. GATT, *supra* note 10, Part IV.

42. "Little of substance resulted directly from these three initiatives. . . . Part IV was mostly rhetoric." LANGHAMMER & SAPIR, *supra* note 14, at 6.

43. GANDIA, *supra* note 17, at 38; LANGHAMMER & SAPIR, *supra* note 14, at 6-7.

44. Although, as described, developing countries can be seen as working as a group, this is not, of course, to ignore the differences that still existed. Indeed, the strongest push for GSPs actually came from the Latin American countries, who felt particularly disadvantaged by the fact that most African, Asian and Caribbean countries already enjoyed preferential arrangements with specific developed countries. The Latin American countries only agreed to support a generalized preferential system on the condition that these other preferential schemes be dismantled. David Wall, *Problems with Preferences*, 47 INT'L AFF. 87, 88 (1971).

45. GANDIA, *supra* note 17, at 37. This, of course, was not actually part of GATT, but the result of a 1962 resolution by the UN's General Assembly. After the conference,

veto, which meant that the developing countries could, from sheer numbers, guarantee passage of any resolution they supported.⁴⁶ However, the resolutions would be non-binding, and have no real effect unless the powerful developed countries endorsed them. Sometimes developing countries passed a resolution over the dissent of the developed countries, knowing that no practical steps would be taken immediately.⁴⁷ The proposal of the GSP was such a resolution. It was not passed by consensus, and so not instituted by UNCTAD, but majority voting led to passage of the principles supporting it, and formation of committees for further study.⁴⁸

The proposal for a GSP took center stage at the UNCTAD conference not just because of the wishes of participating developing countries, but also because it was highlighted by the intellectual centerpiece of the conference, a presentation by Argentinian economist Raul Prebisch.⁴⁹ Prebisch, who later became UNCTAD's first Secretary-General,⁵⁰ had been in charge of preparations for the conference and delivered a speech titled "Towards a New Trade Policy for Development,"⁵¹ now better known simply as the Prebisch Report. Although his primary procedural purpose was to outline the main issues to be discussed at the Conference, Prebisch also used it to propose a comprehensive program of his own. Most notably, his program called for a complete change from the usual GATT policy of simply removing obstacles to the trade of developing countries,⁵² proposing instead that positive assistance be given.⁵³

Among other things, the Prebisch Report proposed that developed countries should grant temporary preferences to the manufactured and semi-manufactured exports of developing countries.⁵⁴ Prebisch suggested a 10-year duty-free period for each manufactured or semi-manufactured export from the time a country began exporting it, that the tariff on some

discussions continued in the Trade and Development board, the continuing UNCTAD body. For more on this conference, see A.S. FRIEDEBERG, *THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT OF 1964* (1969).

46. GANDIA, *supra* note 17, at 37.

47. *Id.*

48. *Id.* at 35; Wall, *supra* note 44, at 89.

49. Raul Prebisch, *Towards a New Trade Policy for Development: Report by the Secretary-General of the United Nations Conference on Trade and Development*, U.N. Doc. E/Conf.46/3 (1964). For a general discussion of Prebisch's ideas, see Gamani Corea, *11th Lecture, 2001: Tribute to Raul Prebisch* 6-12 (2001), available at <http://www.unctad.org/en/docs/prebisch11th.en.pdf> (last visited May 7, 2003).

50. Prebisch was also an observer for the UN at the first meeting of the Group of 77. GANDIA, *supra* note 17, at 35.

51. *Id.* at 36.

52. This being also the policy pursued under the Havana agreements. LANGHAMMER & SAPIR, *supra* note 14, at 7.

53. Prebisch, *supra* note 49, Part II.

54. Prebisch, *supra* note 49, at 65-72.

products be reduced to zero immediately, and that the tariff on others drop immediately by at least 50% and then be gradually phased out within 5 years.⁵⁵ Other existing preferences would be abolished immediately without compensation, but some special measures would be introduced for the least developed countries.⁵⁶

The emphasis on manufactured exports in Prebisch's plan is important to note. Prebisch's proposal was a temporary program to help developed countries create successful industries, and was not meant to be a source of continual support.⁵⁷ Prebisch believed that tariff preferences were necessary to protect infant industries in developing countries:⁵⁸ domestic markets in developing countries were too small to support the establishment of industries on a cost-effective scale, making access to the larger developed country markets necessary for their success.⁵⁹ However, once the 10-year period of beneficial tariff treatment allowed these industries to establish a foreign market, tariffs could be normalized again and the developing country industries would then compete successfully on a level playing field with the industries of developed countries.⁶⁰

Of course, most developed countries, and particularly the United States, opposed Prebisch's proposal, reiterating the traditional GATT stance that the removal of trade barriers was the proper approach to improving the trade of developing countries.⁶¹ They also objected that there was no empirical evidence that Prebisch's plan would work, and that the real problem was the developing countries' own policies.⁶² Moreover, even those developed countries not opposed to Prebisch's plan insisted

55. GANDIA, *supra* note 17, at 37.

56. *Id.*

57. Prebisch stated "[e]xternal cooperation is important, but only as a means of supplementing and stimulating internal action, not as a substitute for it." Michael Cornell Dypski, *The Caribbean Basin Initiative: An Examination of Structural Dependency, Good Neighbor Relations, and American Investment*, 12 J. TRANSNAT'L L. & POL'Y 95, 98 n.17 (2002).

58. LANGHAMMER & SAPIR, *supra* note 14, at 8.

59. *Id.* Prebisch's academic work also emphasized the thesis that whereas the benefits of technical progress in developed countries is retained in those countries through higher incomes, similar benefits generated in developing countries are transferred overseas through lower prices. See generally RAUL PREBISCH, *TOWARDS A DYNAMIC DEVELOPMENT POLICY FOR LATIN AMERICA* (1963); RAUL PREBISCH, *THE ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPAL PROBLEMS* (1950); Raul Prebisch, *Commercial Policy in the Underdeveloped Countries*, 49 AM. ECON. REV., PAPERS & PROC. 251 (1959). For a critical discussion of this idea, see Andrea Maneschi, *The Prebisch-Singer Thesis and the 'Widening Gap' Between Developed and Developing Countries*, 16 CANADIAN J. ECON. 104 (1983). For an outline of Prebisch's later views, see Raul Prebisch, *Raul Prebisch on Latin American Development*, 7 POPULATION & DEV. REV. 563 (1981).

60. LANGHAMMER & SAPIR, *supra* note 14, at 8-9.

61. *Id.*

62. *Id.* at 9.

that other developed countries, including the United States, participate in the plan, if implemented.⁶³ This was a substantial barrier, given the United States' open opposition to any plan of tariff preferences.

Consequently, even though the developing countries at UNCTAD unanimously supported a GSP and agreed on a joint recommendation, this recommendation finally had to be withdrawn after the outright rejection of tariff preferences by the United States.⁶⁴ Ultimately all the developed countries participating in UNCTAD either voted against the resolution endorsing the Prebisch plan of preferences or abstained.⁶⁵

But the discussion of a GSP at UNCTAD did lead to one immediate minor success. Noting that its economic structure prevented it from granting preferences on the scale proposed by Prebisch, Australia nonetheless offered to institute its own GSP scheme.⁶⁶ Australia applied for and received a waiver of the MFN principle in 1966, making it the first country in the world to institute a GSP scheme.⁶⁷

Moreover, the European Economic Community ("EEC") also responded positively to the developing countries. By 1966, a large number of developing countries either had formed preferential trade agreements with the EEC, or had approached it with the intent of doing so.⁶⁸ Although not the generalized system proposed by Prebisch, these bilateral agreements served the same purpose for those countries able to negotiate them. In December 1966, the EEC Commission recommended to the Council of Ministers that a GSP be implemented.⁶⁹

Perhaps the most important effect of the EEC's willingness to make tariff agreements was its insistence that those agreements be reciprocal, meaning that developing countries receiving the preferences also had to give tariff discounts to European products.⁷⁰ Although designed to reduce

63. GANDIA, *supra* note 17, at 36.

64. The countries of Western Europe broadly supported preferences, but differed on how to handle existing preferential agreements, with the British favoring across the board preferences, while the EC favored a selective approach with safeguards for their former African colonies. LANGHAMMER & SAPIR, *supra* note 14, at 9–10. Part of the U.S. opposition was optimism about the Kennedy round of negotiations, after which it was thought that tariffs would be so low that any preferences would be of negligible worth, particularly after taking into account the cost of running the system. Moreover, the U.S. felt that allowing preferential trade could create an undesirable precedent. GANDIA, *supra* note 17, at 37.

65. Not all developed countries were present at the conference. GANDIA, *supra* note 17, at 37.

66. LANGHAMMER & SAPIR, *supra* note 14, at 11.

67. Developing countries did, however, criticize the scheme for being too limited. Products that were already competitive from developing countries were excluded from the scheme, as were those which competed with local products, and those already receiving the benefit of the British Commonwealth preference scheme. GANDIA, *supra* note 17, at 38.

68. GANDIA, *supra* note 17, at 39.

69. *Id.*

70. *Id.*

the benefits developing countries gained through the agreements, this policy ultimately played a major role in the general global adoption of non-reciprocal GSP schemes. The United States worried that the EEC was gaining a competitive advantage through these agreements, which made EEC products cheaper than comparable American products in certain developing countries.⁷¹ Consequently, within a year, at the Conference of Latin American Presidents in Punta del Este,⁷² the U.S. announced that it too would endorse a global GSP, but only a non-discriminatory and non-reciprocal one.⁷³

Building on this increased willingness to adopt a GSP, the Group of 77 met in Algiers before the 1968 UNCTAD II conference and produced the Charter of Algiers, which included a request for the introduction of a GSP.⁷⁴ The developed countries also moved closer to embracing a GSP. The Special Group on Trade with Developing Countries, at the OECD, produced a report for presentation at UNCTAD II, which described in general terms how an acceptable GSP could be implemented.⁷⁵

Eventually, UNCTAD II made little progress toward the introduction of a GSP.⁷⁶ Still, the conference allowed developing countries to further delineate their position. They moved beyond Prebisch's original proposal—that only manufactured and semi-manufactured items should be covered—and instead insisted that tariff preferences should also be given

71. *Id.*

72. Latin American countries had been complaining at this conference about the EEC's preferential relations with African countries. *Id.* at 40; LANGHAMMER & SAPIR, *supra* note 14, at 10; Wall, *supra* note 44, at 90.

73. "Non-discriminatory" means one that does not categorize a particular group of beneficiary countries, as the EEC's agreements had been doing. GANDIA, *supra* note 17, at 39–40; LANGHAMMER & SAPIR, *supra* note 14, at 10. For a detailed discussion of the relationship between the U.S.'s GSP and labor rights, see Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-year Review*, 22 COMP. LAB. L. & POL'Y J. 199 (2001).

74. GANDIA, *supra* note 17, at 39.

75. Wall states:

The document was extremely vague, and in a fundamental sense reflected only the fear of European countries that following the apparent change of attitude of the U.S.A. Administration a generalised scheme of preferences had become a strong candidate for implementation. As a result the document read like a list of hedging positions of the potential donor countries, bringing to light those attitudes towards the scheme which the European countries had left unspoken while the scheme seemed to have been vetoed by the United States.

Wall, *supra* note 44, at 91. Moreover, different OECD countries wanted the GSP to take different forms. The U.S. wanted uniform, non-reciprocal preferences, and a single plan. France and the U.K. particularly opposed this, as they both already had agreements with their former colonies. GANDIA, *supra* note 17, at 39.

76. Indeed, according to one commentator, "an impasse was reached on almost every feature of the proposed scheme." Wall, *supra* note 44, at 91.

to primary commodities and agricultural products.⁷⁷ The developed countries, of course, objected to this proposal, but they agreed that some form of GSP was desirable,⁷⁸ and a resolution passed both embracing a GSP and committing the participating countries to a specific timetable.⁷⁹ Subsequently, a Special Committee on Preferences was established under UNCTAD, which met annually until it dissolved in 1996.⁸⁰

Despite the agreement to create some form of GSP, the lack of consensus as to the GSP's precise nature created predictable problems. Initial attempts to arrange a single GSP on an international level could not draw consensus on the details. As a result, it was decided that each willing nation should simply introduce its own GSP, even though this would mean differing schemes being introduced at different times.⁸¹

By 1969, almost all the members of the OECD had submitted their individual GSP proposals to the Secretary-General of UNCTAD.⁸² Although the schemes would benefit any country claiming "developing" status,⁸³ every plan explicitly reserved the right to refuse preferences to any given country.⁸⁴ The existence of these reservations is an essential

77. GANDIA, *supra* note 17, at 40.

78. *Id.* See also LANGHAMMER & SAPIR, *supra* note 14, at 10.

79. Preferential or Free Entry of Exports of Manufactures and Semimanufactures of Developing Countries to the Developed Countries, U.N. Conference on Trade & Development (UNCTAD), 2d Sess., Vol. I, Annex, Agenda Item 11, at 38, U.N. Doc. TD/97/Annexes (1968).

80. Wall, *supra* note 44, at 92; GUIDE TO THE EUROPEAN UNION'S SCHEME OF GENERALISED TARIFF PREFERENCES 13, at http://europa.eu.int/comm/development/body/theme/spg_en.pdf (last visited Dec. 27, 2002). For an account of the less-than-cooperative approach of the developed countries in this committee see Wall, *supra* note 44, at 92-94.

81. LANGHAMMER & SAPIR, *supra* note 14, at 11.

82. GANDIA, *supra* note 17, at 40.

83. The U.N. states:

There is no established convention for the designation of "developed" and "developing" countries or areas in the United Nations system. In common practice, Japan in Asia, Canada and the United States in northern America, Australia and New Zealand in Oceania and Europe are considered "developed" regions or areas. In international trade statistics, the Southern African Customs Union is also treated as developed region and Israel as a developed country; countries emerging from the former Yugoslavia are treated as developing countries; and countries of eastern Europe and the former USSR countries in Europe are not included under either developed or developing regions.

U.N. Statistics Division, Standard Country or Area Codes for Statistical Use, U.N. Doc. ST/ESA/STAT/SER.M/49/Rev.4 (1999), at <http://unstats.un.org/unsd/methods/m49/m49regin.htm>. See also Reiko R. Feaver, Comment, *China's Copyright Law and the TRIPS Agreement*, 5 J. TRANSNAT'L L. & POL'Y 431, 454 n.162 (1996) ("Unlike 'least developed,' 'developing' status has resisted definition.").

84. Initially, the EEC listed no exceptions, but stated nonetheless that it might add some. The U.S. and the U.K. included an escape clause, allowing them to reduce or withdraw preferences altogether. The EEC also insisted that the preference schemes they already had in

point for understanding the political context of the current Indian complaint, as the adoption of a GSP involved no contractual obligation on the part of the developed country concerned, but was instead a free gift that could be withdrawn at any time.⁸⁵ Thus, the developed countries historically have been given a free hand to manipulate their GSP programs at any time and for any reason.⁸⁶

The final step in the creation of the GSP system occurred in 1971, when the GATT Contracting Parties voted a 10-year waiver from the MFN clause,⁸⁷ thereby allowing the institution of the proposed GSP schemes.⁸⁸ The next month, the EC introduced its GSP, and most OECD countries followed soon thereafter.⁸⁹ The US, however, delayed institution of its own scheme until five years later, when the EC replaced the reciprocal preference schemes it was still operating for its former colonies with non-reciprocal schemes.⁹⁰

Still, at this point, the GSP system was not actually part of the law of GATT, but based upon a temporary exemption from that law. However, when the stark distinction between developing and developed countries persisted at the end of the original 10-year period, it was decided that the tariff preferences needed to be continued.⁹¹ Instead of merely renewing the short-term exemption, the GATT contracting parties decided to add the GSP permanently into GATT, and in 1979 enacted the "Enabling Clause".⁹² This provision officially allows differential treatment for developing countries, without any requirement of GATT-waiver.⁹³ However, it also envisages that developing countries will gradually lose those preferences as they develop, and so retains the vision of the GSP as only a temporary helping hand.⁹⁴

place benefiting their former colonies would continue, and their GSP system was designed to ensure that these agreements weren't undermined. GANDIA, *supra* note 17, at 41–42.

85. LANGHAMMER & SAPIR, *supra* note 14, at 11.

86. For example, the United States' scheme excluded all communist countries, regardless of their development needs. THE TRADE PARTNERSHIP, THE U.S. GENERALIZED SYSTEM OF PREFERENCES PROGRAM 4 (1997) [hereinafter U.S. GSP PROGRAM], at <http://www.tradepartnership.com/pdf/1997gsp.pdf> (last visited Dec. 28, 2002).

87. Generalized System of Preferences, Decision of June 25, 1971, GATT B.I.S.D. (18th Supp.) at 25 (1972).

88. U.S. GSP PROGRAM, *supra* note 86, at 2.

89. LANGHAMMER & SAPIR, *supra* note 14, at 11.

90. *Id.*

91. LANGHAMMER & SAPIR, *supra* note 14, at 12.

92. Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT Doc. L/4903 (Nov. 28, 1979) [hereinafter Enabling Clause].

93. *Id.*

94. LANGHAMMER & SAPIR, *supra* note 14, at 12.

II. THE EC'S GSP SYSTEM

Adopted in 1994, the EC's most recent GSP scheme⁹⁵ divides imported products into two categories, sensitive and non-sensitive.⁹⁶ The distinction is designed to protect domestic producers of certain products from excessively strong competition from GSP-benefiting developing countries.⁹⁷ For a similar reason, the scheme also includes a "safeguard clause," which allows accelerated reestablishment of normal tariffs if GSP-based imports "cause, or threaten to cause, serious difficulties to a Community producer of like or directly competing products."⁹⁸

Consistent with the emphasis in the Enabling Clause that developing countries should only receive GSP preferences as long as they are necessary, the EC's scheme includes a "graduation" mechanism.⁹⁹ This section of the scheme also includes a "de minimis" clause, however, so that if the GSP-covered exports of the country concerned within the sector in question compose less than 2% of the entire GSP-covered imports into the EC within that sector in the previous year, then the graduation mechanism will not be applied to its products.¹⁰⁰

Finally, the least developed countries are given additional benefits through a special "everything but arms" clause, which allows completely

95. The EC adopts its GSP schemes for 10 years, although, as in the present case, alterations can be made during that period. UNCTAD TECHNICAL COOPERATION PROJECT ON MARKET ACCESS, TRADE LAWS, AND PREFERENCES, GENERALIZED SYSTEM OF PREFERENCES: HANDBOOK ON THE SCHEME OF THE EUROPEAN COMMUNITY vii, U.N. Doc. UNCTAD/ITCD/Misc.25/Rev.2 (2002) [hereinafter EC GSP HANDBOOK], available at http://www.unctad.org/en/docs/itcdtsbmisc25rev2_en.pdf.

96. Council Regulation 2501/2001 of 10 December 2001 on Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2002 to 31 December 2004, art. 7, 2001 O.J. (L 346) 1, 5-6 [hereinafter GSP Regulation]. Before 2001 there were four categories: "very sensitive" (15% tariff reduction), "sensitive" (30% tariff reduction), "semi-sensitive" (65% tariff reduction) and "non-sensitive" (100% tariff reduction). EC GSP HANDBOOK, *supra* note 95, at xii.

97. "The sensitivity of products is determined by the situation of the sector manufacturing the same products in the Community. Sensitive products are those of sectors which still require a higher border protection, while non-sensitive products are those which can compete with duty free imports from developing countries." User's Guide to the European Union's Scheme of Generalised Tariff Preferences ¶ 5 (2003) [hereinafter EU User's Guide], at <http://europa.eu.int/comm/trade/gsp/gspguide.htm> (last visited May 7, 2003).

98. GSP Regulation, *supra* note 96, art. 12.

99. *Id.* art. 12, ¶ 1(b). This means that that when a developing country is judged to be competitive with respect to a particular product that single product is then excluded from GSP preferences. There is also a more general "country graduation mechanism," by which an entire country can be excluded from participation in the GSP once it reaches a certain level of development. This occurs when the country has for three consecutive years both (1) been classified by the World Bank as a high income country, and (2) had a "development index" of a certain size, the formula for which is provided in Annex II of the EC's GSP regulation. *Id.* art. 3.

100. *Id.* art. 12, ¶ 1(b).

duty-free access to the EC for all products of such countries, except arms and ammunition.¹⁰¹

The source of the current dispute with India, however, is the three special "incentive" preferences that are included in the scheme: (1) special arrangements supporting measures to combat drugs, (2) special incentive arrangements for labor rights,¹⁰² and (3) special incentive arrangements for environmental protection.¹⁰³ These "incentives" consist in additional reductions to the already GSP-reduced tariff rate.¹⁰⁴ The "drug" preferences are given to specific countries judged to be effectively combating drug production and trafficking, while the labor and environment incentives are given to countries that adhere to certain labor and environmental standards.¹⁰⁵ The incentives are substantial enough that the tariff reduction for industrial products can double, and nearly double for agricultural products.

When the EC's labor incentive was originally instituted, developing countries had to demonstrate that they had adopted and applied in their national legislation the substance of International Labor Organization ("ILO") Conventions 87 and 98 (the right to organize and to bargain collectively)¹⁰⁶ and 138 (minimum age for employment).¹⁰⁷ Since 2001, however, the incentives have been explicitly linked to the ILO's Core Labor Standards ("CLS"):¹⁰⁸ the elimination of forced labour (Conventions 29 and 105),¹⁰⁹ freedom of association and the right to collective bargaining (Conventions 87 and 98),¹¹⁰ elimination of

101. This access being phased in over time for fresh bananas, rice and sugar, which are judged to be particularly sensitive areas. EU User's Guide, *supra* note 97, ¶ 4.

102. The U.S. GSP scheme also includes its own labor conditionality, implemented in 1984. GSP Renewal Act of 1984, Pub. L. No. 98-573, 98 Stat. 3019 (1984). For a discussion of the history of labor conditionality in the U.S. GSP, see Compa & Vogt, *supra* note 73.

103. GSP Regulation, *supra* note 96, arts. 14–25.

104. *Id.* art. 8, 10.

105. *Id.* art. 10, 14, 21.

106. Convention concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 17 [hereinafter Freedom of Association Convention]; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257 [hereinafter Collective Bargaining Convention].

107. Convention concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297 [hereinafter Minimum Age Convention].

108. See generally International Labour Organization, ILO Declaration on Fundamental Rights and Principles at Work, ILO Doc. CIT/1998/PR20A, available at http://training.ilo.org/ils/foa/library/declaration/decl_en.html (last visited Oct. 13, 2003).

109. Convention concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; Convention concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291.

110. Freedom of Association Convention, *supra* note 106; Collective Bargaining Convention, *supra* note 106.

discrimination in employment (Conventions 100 and 111),¹¹¹ and the abolition of child labor (Conventions 138 and 182).¹¹² Developing countries no longer need to have adopted the conventions, but must have incorporated the substance of them into their laws.¹¹³ They must also be able to demonstrate to the EC that the relevant laws are being effectively applied. Moreover, to keep the "incentives," developing countries have to certify that individual shipments, and not just an industry as a whole, comply with the requirements.

When the EC receives a request from a developing country for these "incentive" preferences, it publishes a notice in the Official Journal of the European Communities, inviting parties to make comments and submit information.¹¹⁴ The authorities of the applying country are involved throughout the evaluation process, but the EC reserves the right to demand such things as spot inspections, to ensure that standards are actually being met.¹¹⁵ It is estimated that a decision as to whether a developing country is entitled to receive these benefits should take less than a year, but the requesting country can ask for a delay on the decision if it requires more time to adhere to the requirements.¹¹⁶

The "incentives" are designed to be adaptable to the reality of a developing country as the applicant country can exclude certain sectors in which the requirements are not fulfilled.¹¹⁷ Moreover, acceptance or rejection by the EC is not an "all or nothing" matter, as the EC itself can also exclude products from certain sectors in which the conditions are not fulfilled, even if they were part of the application filed.¹¹⁸ Even the

111. Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303; Convention concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31.

112. Minimum Age Convention, *supra* note 107; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 38 I.L.M. 1207.

113. GSP Regulation, *supra* note 96, art. 14.2.

114. *Id.* art. 16.1.

115. *Id.* art. 16.3.

116. The EU states:

The examination of a request should be completed within a year. After consultation of the Generalised Preferences Committee, the Commission decides whether to grant the benefit of the special incentive arrangements or not. However, where the requesting country needs more time in order to conform to the requirements, it may ask that the decision be postponed. The Commission may decide to exclude certain sectors where, according to its findings, the conditions for granting the additional preferences are not fulfilled.

EU User's Guide, *supra* note 97, ¶ 8:

117. *Id.*

118. *Id.*

fact that a sector has been previously “graduated” will not exclude it from receiving the additional “incentive” preferences.¹¹⁹

The next section analyzes in detail the arguments at the center of the dispute over labor conditionality in the EC’s GSP, and explains why it is not WTO-inconsistent.

III. THE INDIA/EC DISPUTE

On March 12, 2002, India requested consultations with the EC¹²⁰ about its GSP scheme, specifying their objection to the labor/environment/drug preferences. Although there is evidence that India is now only challenging the EC’s “drug preference” and not its “labor preferences,”¹²¹ the following discussion will address how a dispute between India and the EC over the EC’s “labor preferences” should be resolved, as a way of explaining why such a scheme is indeed WTO compliant.

First, it is important to note that India is not complaining about the EC’s GSP itself, but rather about the “incentives” that the EC has added to its scheme.¹²² The argument suggested by India in its request for consultations is that GSP preferences are only permitted under the Enabling Clause “in order to increase the export earnings, to promote the industrialization and to accelerate the rates of economic growth of [developing] countries.”¹²³ Since the “incentives” in the EC scheme are designed for

119. *Id.* ¶ 6.

120. “Consultations” are required prior to bringing a case at the WTO. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 4, Legal Instruments—Results of the Uruguay Round vol. 1, 33 I.L.M. 1225, 1228–29 (1994).

121. European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, Request for Consultations by India, WTO Doc. WT/DS246/1 (Mar. 12, 2002) [hereinafter Request by India]. Third party submissions in the case by the U.S. suggest that India may have narrowed its argument, to solely challenge the drug preferences. *See* Third Party Submission of the United States regarding European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, WTO Doc. WT/DS246 (Apr. 30, 2003), available at <http://www.wto.org>. However, it is unclear whether the U.S. submissions reflect a change in India’s argument, or just the specific interests of the United States, as the United States itself has a regional tariff “preference” scheme to help reward specified Latin American countries engaged in the fight against drugs, the Andean Trade Preferences Act, 19 U.S.C. §§ 3201–3206 (2000). For details on this scheme, see First Report to the Congress on the Operation of the Andean Trade Preference Act as Amended. THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FIRST REPORT TO THE CONGRESS ON THE OPERATION OF THE ANDEAN TRADE PREFERENCE (2003) available at <http://www.ustr.gov/reports/2003atpa.pdf>.

122. Request by India, *supra* note 121.

123. This being the language used in the Preamble to the 1971 Decision that first introduced the Generalized System of Preferences, *supra* note 87, pmbl.

social purposes and not economic ones (India argues), they cannot be justified by the Enabling Clause, and so are illegal under the MFN clause of the WTO agreement.

To understand the rationale behind the case, it is important to identify where the burdens will lie. As the complaining party, India/Thailand has the initial burden of showing that there is a *prima facie* case that the EC's regulation violates WTO obligations.¹²⁴ The EC then bears the burden of showing that it can nonetheless justify its regulation under WTO standards.¹²⁵ However, as will be argued later, this does not preclude India from bearing the burden on a specific issue.

Given that the EC's tariff "incentives" clearly violate the MFN principle, if they do not qualify under the Enabling Clause,¹²⁶ India would seem easily to be able to carry their burden of demonstrating that the EC's "incentive" scheme is *prima facie* discriminatory, meaning that now the presumption is in their favor. The EC has to show that its preference system is consistent with the enabling clause, rather than merely contending that India has not shown that it is not. As I will now argue, the EC should be able to do that, and so India will ultimately fail in their challenge.¹²⁷

A. The EC's Case

India seems able to make a very strong point that the incentives are not being offered for economic reasons. The text of the Enabling Clause and the original waiver emphasize that the goal of these preferences is to benefit the trade of developing countries.¹²⁸ Hence, if offered for any non-economic reason, incentives will not qualify under the Enabling Clause waiver to MFN, and so will be illegal under WTO law.

The EC can respond to this argument in two ways. First, it can argue that GSP preferences, in fact, do not need to be offered for economic

124. "The general rule is that the initial burden of proof rests with the claimant. This holds true even when it requires the claimant to demonstrate the negative, such as raising a presumption that there are no relevant studies or reports supporting another party's measures." Andrew W. Shoyer & Eric M. Solovy, *The Process and Procedure of Litigating at the World Trade Organization: A Review of the Work of the Appellate Body*, 31 LAW & POL'Y INT'L BUS. 677, 689 (2000).

125. "Once the claimant establishes a *prima facie* case of a breach of a covered agreement, the burden shifts to the defendant to refute the claimed inconsistency." *Id.*

126. As the GSP tariff discounts are only offered to developing countries. As a result, the GSP discriminates against developed countries.

127. However, for an argument that the WTO's legal structure should not concern itself with labor standards in any situation, but avoid any direct consideration as a "political question," see Guzman, *supra* note 2.

128. Generalized System of Preferences, *supra* note 87.

reasons, but only have to have a desirable economic effect.¹²⁹ Second, it can argue that their preferences are indeed being offered for economic reasons, as adherence to the ILO's Core Labor Standards¹³⁰ helps economic development.

That economic motives may not be required for a GSP scheme is questionable. While the Enabling Clause does specifically justify the allowance of tariff preferences by reference to the trade needs of developing countries, it also states that they shall be "designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries."¹³¹ The inclusion of "development" along with trade may provide some support for an argument that the preferences need not be designed solely to benefit the developing country recipient economically, as long as they do in fact create such a benefit.¹³² However, "development" can also be a purely economic term, and the fact that the other two "needs" mentioned in the sentence are themselves purely economic strongly suggests that this is the reading that should be given to "development" as well. Moreover, as illustrated above, historically the arguments for a GSP were consistently economic. Given the ambiguity of the meaning of "development" and the historical arguments for the GSP, it is at the very least unclear whether the EC can carry its burden with this argument.

Nonetheless, there is still some support for this position in WTO jurisprudence, through a parallel with the Appellate Body's reasoning in the *Shrimp/Turtle* decision.¹³³ In *Shrimp/Turtle*, a central part of the dispute was the meaning of "exhaustible natural resources" in GATT Article XX, which allowed measures to conserve such resources, even though they would otherwise be GATT-inconsistent.¹³⁴ This provision had historically referred to things such as oil and minerals,¹³⁵ but the US attempted to argue that it applied to living creatures, specifically turtles, as well.¹³⁶ In interpreting the term in question, the Appellate Body

129. That is, that the motivation of the granting country is irrelevant, as the GSP waiver is intended to allow economic assistance to be given to developing countries. To deny assistance that would indeed benefit a developing country's economy merely because of the motives of the granting country is inconsistent with that goal.

130. As is required by the EC's labor incentive.

131. Enabling Clause, *supra* note 92, ¶ 3(c).

132. This latter qualifier being required by the fact that the sentence says "development, financial and trade needs," rather than "development, financial or trade needs." *Id.*

133. WTO Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, DSR 1998:VII 2755 (Oct. 12, 1998).

134. GATT, *supra* note 10, art. 20(g).

135. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL L. 491, 502 (2002).

136. *Id.* at 501.

appealed to the fact that the preamble to the WTO Agreement describes “sustainable development” as a goal of the international trading system, and held that the term should, therefore, be interpreted in the light of contemporary conceptions of “sustainable development.”¹³⁷ After referring to numerous international agreements and resolutions, the Appellate Body then held that despite the fact that “exhaustible natural resources” had not covered living creatures when initially adopted, evolving understandings of “sustainable development” as reflected in international law had now extended the concept to the point where it did.¹³⁸

Likewise, the EC can argue that many international economic agreements now include labor conditionality,¹³⁹ showing that the international community now acknowledges labor standards to be essential to economic development. The WTO’s own recent endorsement of “sustainable development” further supports this argument,¹⁴⁰ much as the Rio Declaration on the Environment helped sway the Appellate Body in *U.S.-Shrimp/Turtle*.¹⁴¹

India could claim that explicit statements made at the WTO Ministerial Conference in Singapore in 1996 and implicitly endorsed in Doha in 2001—that “the ILO is the competent body to deal with [labor] standards,” argue strongly against such an understanding of economic development as applied to the GSP system.¹⁴² Yet the Appellate Body’s

137. *Id.* at 502.

138. *Id.*

139. See, e.g., North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Sept. 13, 1993, Annex 1, 32 I.L.M. 1499 (endorsing labor standards included in the ILO’s Core Labor Standards and some others). For more examples, see generally Peter Bakvis, *Labour Standards and Development* (2002), [http://wbln0018.worldbank.org/eurvp/web.nsf/Pages/Paper+by+Bakvis/\\$File/BAKVIS+FINAL.PDF](http://wbln0018.worldbank.org/eurvp/web.nsf/Pages/Paper+by+Bakvis/$File/BAKVIS+FINAL.PDF) (last visited Dec. 27, 2002).

140. WTO Ministerial Declaration, WTO Ministerial Conference, 4th Sess. (Doha), WTO Doc. WT/MIN(01)/DEC/W/1 ¶ 6, (Nov. 9–14, 2001) (“We strongly reaffirm our commitment to the objective of sustainable development . . .”). Note, though, that the WTO’s discussions of “sustainable development” have centered on environmental, not labor issues. See generally, Mathieu Regnier, *Trade and Sustainable Development at Doha* (2001), at http://oikosinternational.org/centers_of_excellence/itas/Lidija.pdf (last visited Oct. 20, 2003). However, the notion of “sustainable development” is not restricted to an environmental context. For example, the Sustainable Development Department of the Inter-American Development Bank has a “Labor Markets” division. Sustainable Development Department, Inter-American Development Bank Website, at http://www.iadb.org/sds/soc/site_12_e.htm (last visited Oct. 30, 2003).

141. U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992).

142. World Trade Organization, Singapore Ministerial Declaration, Dec. 13, 1996, WTO Doc. WT/MIN(96)/DEC, para. 4, reprinted in 36 I.L.M. 218, 221 (1997). However, Prof. Howse criticizes this stance:

apparent willingness to bring social concerns into the WTO¹⁴³, combined with the negative publicity that would result if the EC regulations were struck down, may lead to a holding for the EC.

Turning to the argument that the “incentives” are indeed being offered for economic reasons, the EC’s case is very strong, as there is now a great deal of evidence indicating that adhering to the Core Labor Standards does indeed benefit an economy. For example, adherence to the Core Labor Standards has been clearly linked to a reduction in income inequality within a country.¹⁴⁴ Arguably one restraint to the economies of developing countries is that the workers are so lowly paid that they do not have sufficient buying power, and so the economy is unable to grow.¹⁴⁵

Moreover, many recent studies have explicitly stated that adherence to Core Labor Standards can contribute to economic growth.¹⁴⁶ As stated by one economist, “economic theory predicts, and empirical evidence indicates, lax enforcement of workers’ rights encourages

The ILO, which concerns itself with international labor rights, does not possess the jurisdiction to determine whether trade sanctions undertaken by its members for labor rights reasons are consistent with trade rules under the General Agreement on Tariffs and Trade (GATT) or other WTO treaties, much less to waive or override such rules in the event of inconsistency. Indeed, according to the WTO Dispute Settlement Understanding, any determination concerning the violation of a WTO agreement must be taken within the ambit of the WTO’s own institutional framework for settling disputes.

Robert Howse, *The World Trade Organization and the Protection of Workers’ Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 134 (1999). Moreover, the WTO’s claim must also be evaluated in the context of the fact that the ILO has already rejected a suggestion that it should certify and label products from countries complying with the core labor standards. Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. INT’L ECON. L. 43, 47 (2000).

143. This, at least, being one possible reading of the Shrimp/Turtle decision.

144. Bakvis, *supra* note 139, at 8–9.

145. This, notably, being one of Prebisch’s own arguments. *See supra* note 59, and accompanying text.

146. *See, e.g.*, World Bank, *Core Labor Standards Toolkit*, at <http://www.worldbank.org/cls> (last visited Oct. 15, 2003); ORGANIZATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT (OECD), *TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKER’S RIGHTS AND INTERNATIONAL TRADE* (1996) (finding a positive correlation between economic growth and respect of Core Labor Standards); J.E. Dølvik & Liv Tørres, *Globalisation, Work, and Labour Standards* (2002), at 43, <http://odin.dep.no/archive/udvedlegg/01/03/rapp9064.pdf> (“there is a strong connection between economic growth and improvement of labour standards”); David Kucera, *The Effects of Core Workers’ Rights on Labour Costs and Foreign Direct Investment*, International Institute for Labour Studies Discussion Paper DP/130/2001 (2001), at 4, available at <http://www.ilo.org/public/english/bureau/inst/download/dp13001.pdf> (“survey results suggest that if stronger worker rights are associated with higher labour costs—a negative for FDI [Foreign Direct Investment]—but also with greater stability—a positive for FDI—the positive effects may well offset the negative”).

prolonged reliance on less-skilled-labor-intensive activities and does little to encourage economy-wide capital formation, the development of more advanced industries, and long-term growth.”¹⁴⁷

The evidence seems weaker for free association than for the other Core Labor Standards, arguably because whether free association is beneficial depends upon the type of association that takes place, which itself depends on many things. Werner Sengenberger, for instance, has argued that a comparative study of the attitudes of labor unions to industrial change, raises:

The general question of whether it is really excessive institutionalization or over-regulation that are to blame when standards run into apparent conflict with economic objectives; or whether, on the contrary, it is rather the “under-development” of labour institutions—be it lack of participation, or lack of representation at particular levels of organization—which is at the root of the problem.¹⁴⁸

It also has been argued:

When workers can organize and bargain collectively, they will be able to push for decent working conditions and for better wages; they will be able to garner a larger share of the fruits of globalization. This will lead to workers becoming owners of other types of property and will help give incentives for workers to invest more in their own skills and in the success of the companies for which they work. It will help build a middle class. In fact, the ability of workers to organize and bargain was instrumental in helping the United States develop a strong middle class during and after the industrial revolution.¹⁴⁹

Hence, while free association itself may not correlate strongly with economic growth, free association, *properly handled*, may.

Although the connection between high labor standards and economic development is still highly contested, it seems clear that the neither a panel nor the Appellate Body will demand unanimity among economists favoring labor standards before any country can utilize the

147. PETER MORICI, *LABOR STANDARDS IN THE GLOBAL TRADING SYSTEM* 6 (2001).

148. Werner Sengenberger, *Labour Standards: An Institutional Framework for Restructuring and Development*, in *CREATING ECONOMIC OPPORTUNITIES: THE ROLE OF LABOUR STANDARDS IN INDUSTRIAL RESTRUCTURING* 3, 7 (Werner Sengenberger & Duncan Campbell eds., 1994).

149. Rep. Sander M. Levin, Speech for the International Labor Standards Conference (May 19, 2002), available at <http://www.house.gov/Levin/05.19.02.html> (last visited Oct. 29, 2003).

argument that standards promote economic development.¹⁵⁰ After all, it is arguably even more highly contested whether a GSP program promotes economic development, so a strong stance by the WTO's dispute resolution system would be completely unworkable as an approach to analyzing GSP problems.¹⁵¹ The only reasonable approach, then, is for the Appellate Body simply to require that a GSP-granting country be able to provide solid evidence that its specific program in fact aids economic development, in order to be able to qualify under the "economic" conditionality of the GSP waiver.

Once it is accepted that the "incentives" are indeed inducing developing countries to adopt standards that will help their economic development, the only problem for the EC's case is that it might seem objectionable for a developed country to be using the GSP system as a way of forcing its own values onto developing countries.¹⁵² After all, while high labor standards may indeed contribute to economic growth, they are clearly not the only way to get such growth. The WTO's dispute resolution system might, then, be wary of endorsing such a use of the GSP, particularly when, as shown above, such a use is antithetical to the motivating intent behind the GSP system.

One defense of the EC on this point might be to note that India is itself a member of the ILO. Indeed, India was a founding member of the ILO, and has been permanent member of its governing body since 1922.¹⁵³ However, India did not withdraw when the ILO announced that it regarded the Core Labor Standards as obligations to all members,

150. Such a conclusion is supported by the Appellate Body's comment on the kind of scientific consensus required to justify reliance upon scientific evidence in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures:

Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community. In some cases, the very existence of divergent views presented by qualified scientists who have investigated the particular issue at hand may indicate a state of scientific uncertainty. Sometimes the divergence may indicate a roughly equal balance of scientific opinion, which may itself be a form of scientific uncertainty. In most cases, responsible and representative governments tend to base their legislative and administrative measures on "mainstream" scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources.

WTO Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, DSR 1998:1 135, ¶ 194 (Feb. 13, 1998).

151. For a discussion of relevant economic studies of the effect of the GSP on developing country economies see Whalley, *supra* note 31, at 1323–24 (concluding that "[w]hen combined with the seeming frailness of GSP schemes under graduation pressures, the overall benefits to developing countries seem of limited consequence" [footnote omitted]).

152. See generally Srinivasan, *supra* note 3.

153. International Labour Organisation, Subregional Office for South Asia, at <http://www.ilo.org/public/english/region/asro/newdelhi> (last visited Oct. 29, 2003).

whether they had signed the relevant conventions or not.¹⁵⁴ This point is unlikely to play a significant role in a WTO panel's reasoning, but may help to reduce their concerns about over-riding the autonomy of a contracting party by interpreting a GATT provision in an unconventional way.

Finally, it should also be noted that the traditional objections of developing countries to the imposition of high labor standards cannot be made in this case, as it is difficult to portray the GSP incentives as "protectionist."¹⁵⁵ Indeed, these "incentives" actually serve as a means by which the EC can at least partially carry the cost of improving labor standards in developing countries. Of course, the additional costs from better labor regulations would be imposed even on those products not sold to the EC, so some additional cost would be borne by India. However, since conforming to the EC's standards is voluntary, this is merely a factor that India can consider, and is not directly a cost imposed on them by the EC. Again, a WTO panel should not find this point significant, but could alleviate some of their misgivings.

Ultimately, it seems clear that the strongest argument that the EC can make for the WTO-consistency of its preferences is that they are indeed being offered for economic reasons. It is certainly controversial amongst economists whether high labor standards are economically beneficial,¹⁵⁶ but a WTO panel is very unlikely to demand that a nation conform its policies to economic orthodoxy, even in the name of non-discrimination, as long as there is some significant body of reputable economic opinion that supports its actions.

B. India's Best Arguments

Even if the EC successfully argues that the "incentives" are being offered in the name of economic development, India may argue that the specific nature of the EC's program is unacceptable under the WTO. This argument might generate sympathy, but ultimately will not be strong enough to win the case.

154. ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, art. 2, 37 I.L.M. 1233, 1237 (1998).

155. For the general argument that labor standards are a protectionist move by developed countries see Srinivasan, *supra* note 3. It should also be considered, however, that the GSP can be used as leverage for protectionist purposes, even though it is not itself protectionist. Whalley argues that "[t]he threat of graduation from GSP has, itself, been used on a number of occasions by developed countries as a mechanism to force developing countries to make changes requested by developed countries in other non-trade policy areas (such as intellectual property)." Whalley, *supra* note 31, at 1322.

156. See, e.g., Richard Freeman, *International Labor Standards and World Trade: Friends or Foes?*, in *THE WORLD TRADING SYSTEM: CHALLENGES AHEAD* (Jeffrey J. Schott ed., 1997).

India may reiterate the statement by the WTO Ministerial at Singapore (1996) that "the ILO is the competent body to deal with [labor] standards."¹⁵⁷ However, when properly understood, that pronouncement simply does not apply to this particular case. By allowing the labor incentives to remain part of the EC's GSP program, the WTO would not itself be enforcing labor standards, any more than it enforces the substantive aspects of trade policies generally. Rather, it would be explicitly avoiding the issue, and leaving each State to determine its own policy. To argue otherwise requires a premise that any trade-related measure not precluded by the WTO is necessarily endorsed by it. The WTO's statement at Singapore, then, can only be understood as meaning that the WTO does not wish to become a global enforcer of labor rights, not that Member States are forbidden from including labor conditionality in their trade agreements.

A stronger argument for India is that the EC's regulations do not take fair account of the nature of the labor markets in developing countries, and hence cannot be designed to benefit developing economies. The claim here is not that developing countries are unwilling to enforce strong labor laws, but rather that they are unable to because of the large amount of unofficial work in their countries.¹⁵⁸ Consequently, India may argue, the EC's GSP system is clearly not a genuine attempt to help developing countries develop economically, since it allows a problem inherent to developing countries to disqualify them from receiving its benefits.

157. Bakvis, *supra* note 139, at 10.

158. For example, Mishra argues:

There is a notion in the developing countries that labour standards improve only when economies and job opportunities grow. Globalisation aims at improving our growth rate and thereby improving labour standards, though not at the same rate. So far this has not really happened. The condition of labour in the formal sector [in India] is reasonably good as they are covered by comprehensive labour laws. Here wages are relatively high and working conditions relatively good. However, this sector covers just about 8% of the workforce while it contributes nearly 40% of national output. The hard Indian reality is that the vast majority of the underprivileged workers are found in the informal sector which covers almost 92% of the workforce. The working conditions in the informal sectors are extremely bad and the workers are nearly totally bypassed by labour laws. The incidence of child labour is common in this sector. The labour in this sector finds it difficult to organise because of the fear of being dismissed or antagonised by their employers. To believe that the kind of labour standards being invoked under the WTO aegis can be applied to India's informal sector, at least to a large part of it is almost like living in a dream.

Harindra Kishor Mishra, *Impact of WTO on Indian Economy*, in *WTO AND THE INDIAN ECONOMY* 99, 106-07 (G.K. Chadha ed., 2001).

Although there does seem to be a genuine problem pointed out by this argument, its effectiveness as an objection to the EC's GSP program is largely undercut by the fact that the EC's incentive scheme only requires that the laws be "effectively applie[d]."¹⁵⁹ This requirement seems flexible enough to require taking into account the facts of the specific situation in question, and to allow that laws are "effectively applied" when they have as great an effect as they can and there are no readily available options that would do more. There is no clear requirement in the EC's GSP Regulation that the problem be completely solved. This leaves a WTO panel with the option of ruling that the EC's regulation itself is acceptable, but that any given denial of the preferences can be challenged by the developing country concerned if it can demonstrate discriminatory application of the rule in its case.¹⁶⁰

Finally, India may attempt to advance an MFN-based "moral" argument to buttress its more strictly legal arguments. The MFN requirement for GATT-consistent trade rules is that the regulation must not be discriminatory amongst WTO member parties. The GSP systems, of course, are themselves explicit exceptions to this provision. However, India may argue that the way the EC grants preferences discriminates between developed and developing countries by placing developing countries in a secondary position in the trading system. That is, it is not that particular countries are being discriminated against, but that developing countries as a whole are being reduced to a secondary status through a provision designed to benefit them.

It is unclear how strong this argument is, since developing countries originally wanted the GSP, and it has long been accepted that GSP-granting countries can stop giving preferences to specific developing countries for any reason at all. The United States' GSP scheme, for example, has included a labor conditionality provision for decades, and countries have indeed lost their preferences for violation of fundamental labor rights.¹⁶¹ Thus, the way that GSP schemes have always been adopted seems itself to place developing countries in the secondary position that this objection attempts to build upon. Because a WTO panel is

159. GSP Regulation, *supra* note 96, art. 14.2.

160. This is the approach taken by the WTO Panel, *United States—Sections 301–310 of the Trade Act of 1974* WTO Doc. WT/DS152/R, DSR 2000:II 815 (Jan. 27, 2000) [hereinafter U.S.—Sections 301–310].

161. HENRY J. FRUNDT, *TRADE CONDITIONS AND LABOR RIGHTS: U.S. INITIATIVES, DOMINICAN AND CENTRAL AMERICA RESPONSES* 9 (1998). This provision, however, is not an "incentive" scheme as the EC is offering, and does not face exactly the same challenge. For a generally positive review of the effect of the U.S.'s GSP labor conditionality on labor rights in developing countries, see Compa & Vogt, *supra* note 73.

not bound by past practice,¹⁶² it may choose to ignore this fact but India's argument will be substantially weakened.

C. *The Outcome*

The determinative factor in the resolution of this dispute, however, is not one of the above arguments regarding WTO-consistency of the EC's GSP. It is rather the reality of the approach WTO jurisprudence has taken towards national regulatory schemes. Enormous deference is given to national regulations, and a regulation will not be struck down as WTO-inconsistent unless it is unavoidably inconsistent.¹⁶³ If it is at all possible to operate the regulatory scheme in question in a way consistent with the WTO, then it will be upheld, allowing only that any given application of the regulation can be challenged for its WTO consistency.¹⁶⁴ The difficulty in challenging a national regulation is even greater than this might suggest, however. It has been held that even if a regulation is textually WTO-inconsistent, if the country concerned is willing to make representations at the hearing that it will not apply the regulation in a WTO-inconsistent manner, the regulation will be upheld, despite its text.¹⁶⁵

162. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(b), 1155 U.N.T.S. 331, 340. ("[S]ubsequent practice" is only relevant as part of the "context" of the treaty). The Vienna Convention is relevant because the Dispute Settlement Understanding, which controls the practice of WTO dispute resolution bodies, requires that agreements be interpreted "in accordance with customary rules of interpretation of public international law." See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 3.2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol 31, 33 I.L.M. 1226 (1994).

163. The panel in *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco* stated:

Panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.

WTO Panel Report, *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, Oct. 4, 1994, GATT B.I.S.D. (41st Supp., vol. 1) 131 at 174, ¶ 118 (1997).

164. *Id.*

165. In *U.S.—Sections 301/310*, the panel found:

[T]he statutory language of Section 304 constitutes a serious threat that determinations contrary to Article 23.2(a) may be taken and, in the circumstances of this case, is prima facie inconsistent with Article 23.2(a) read in the light of Article 23.1. We then found, however, that this threat had been removed by the aggregate effect of the SAA and the US statements before this Panel in a way that also removes the prima facie inconsistency and fulfils the guarantees incumbent on the US under Article 23. In the analogy described in paragraph 7.65, the sign "No Trespassing. Trespassers may be shot on sight" was construed by us as going against the mutual

The problem this creates for India/Thailand is that if an incentive-based scheme can be operated in a way functionally equivalent to a traditional “give-and-take-away” scheme, then the EC can simply enter the hearing and state that even if the incentive-based approach is unacceptable, it will simply treat the regulation from now on as giving preferences to all developing nations, but then removing them from those who cannot demonstrate that they meet the required labor standards. Consequently, since there is no functional distinction in this case between give-and-take-away preferences and giving-as-an-incentive, India needs to offer a reason why even the former approach would leave the EC’s scheme WTO-inconsistent.

India could argue that a give-and-take-away approach is unacceptable. The EC’s approach allows creation of a scheme in which it accords benefits to all developing countries, but then takes them away unless they can meet requirements designed in such a way that only a single country could meet – thus, getting around the non-discrimination basis of the GSP.¹⁶⁶ Consequently, even a give-and-take-away scheme must be subject to some scrutiny.

There does seem to be one way to draw a distinction between acceptable and unacceptable give-and-take-away GSP schemes, as by the demonstrated intent of the scheme. A scheme so finely tailored that only a select few developing countries can qualify under it does not benefit developing countries merely for being developing countries. It capitalizes on this benefit available to developing countries in order to give benefits for a completely different reason – this reason determined by the developed country. Yet, as mentioned earlier, the language of the Enabling Clause indicates that the preferences need to be given to convey an economic benefit upon the developing country, and for no other reason.¹⁶⁷

promise made among the neighbours always and exclusively to have recourse to the police and the courts of law in any case of alleged trespassing. Continuing with that analogy, we would find in this case that the farmer has added to the original sign which was erected for all to read another line stating: “In case of trespass by neighbours, however, immediate recourse to the police and the courts of law will be made”. We would hold—as we did in this case—that with this addition the agreement has been respected.

U.S.-Sections 301-310, supra note 160, at 1149, ¶ 7.131.

166. Keeping in mind that the discretion given to GSP-giving countries as to when they can refuse to give preferences is large enough to have allowed the U.S. to refuse to give them to communist countries, for a purely political motive. *The U.S. Generalized System of Preferences Program, supra* note 86, at 4.

167. Of course, it was acknowledged earlier that this reading of the text is open to some dispute, but then this entire argument of incentive versus give-and-take-away only becomes necessary if one accepts the “pure economic” reading, so presumes as its basis that any other reading has already been rejected.

A WTO panel evaluating such a case, then, could merely require that the challenging country demonstrate that the GSP scheme in question is indeed an attempt to illegitimately get around the WTO's constraints. If, however, the panel determines that the intent behind the scheme is legitimate, then the scheme should be held to be so as well, no matter how restricted the beneficiaries ultimately are.

In the dispute at hand, then, the simple fact that the regulations concerned are labor regulations is irrelevant, since, as argued above, it is not implausible for a country to claim that higher labor standards will indeed convey an economic benefit to a developing country. However, the precise labor standards at issue might be judged to be so unreasonably high or so irrationally put together, or the procedures for applying for the preferences so imposingly complex, that the scheme cannot plausibly be taken to be a genuine attempt to convey an economic benefit. Rather, it can only be seen to be an attempt to induce the developing country concerned to change its social policies.

Unfortunately, the result of this analysis in the dispute at hand requires far more facts than are currently available, so would have to actually be left to a WTO dispute resolution panel. However, as things stand currently there does not seem to be any reason to believe that the EC's scheme is anything other than a genuine attempt to raise labor standards in an economically plausible way.

Finally, of course, there remains the question of who should bear the burden on the specific issue of the intent of the regulation. It may seem that the EC should be required to demonstrate their own good intent since, as discussed above, they will at this point have the burden of showing that their regulation is WTO-consistent. However, there is a suggestion in WTO case law that India will be expected to prove the EC's wrongful intent. While confirming that a principle of good faith is operative in WTO disputes, the Appellate Body has rejected "the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion."¹⁶⁸ This statement seems to embrace a presumption of good faith on the part of WTO disputants. Applying the same rationale here would mean that if the EC could reasonably be understood to have instituted their GSP scheme to convey an economic benefit, as required by GATT, then they should be held to have done so, and it is India's responsibility to prove their wrongful intent. Thus, although it is the EC's responsibility to demonstrate that its regulation is

168. WTO Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/AB/R, ¶ 298 (Jan. 27, 2003).

WTO-consistent, in this particular case the question of the regulation's consistency will turn upon an issue that must be demonstrated by India. Hence, India will bear both the *prima facie* burden and the ultimate burden, and as argued above, will have difficulty carrying the latter.

CONCLUSION

Developing countries had to fight long and hard for GSP preferences, and it is clear that they benefit from them greatly. However, if a benefit is freely given it can become a chain as well as an aid, and that is the problem with which developing countries are now faced. Unable to secure the agreement of developed countries to a scheme of mandatory tariff preferences, or even significant constraints on when voluntary preferences could be withdrawn, they were forced to settle for a discretionary system that ultimately conveys to developed countries the ability to influence the domestic policies of developing countries. However, while this may be a desirable tool when used to help the disempowered, as is arguably so in the current case, it can, of course, also be abused. As a result, while it should be a great cause of celebration when the EC's scheme is upheld as WTO-consistent, this should not serve as a disincentive from closer examination of the GSP system, in order to find a way that developed countries might best be constrained from using it in objectionable ways within a WTO system that goes out of its way to avoid striking down national regulations.